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In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

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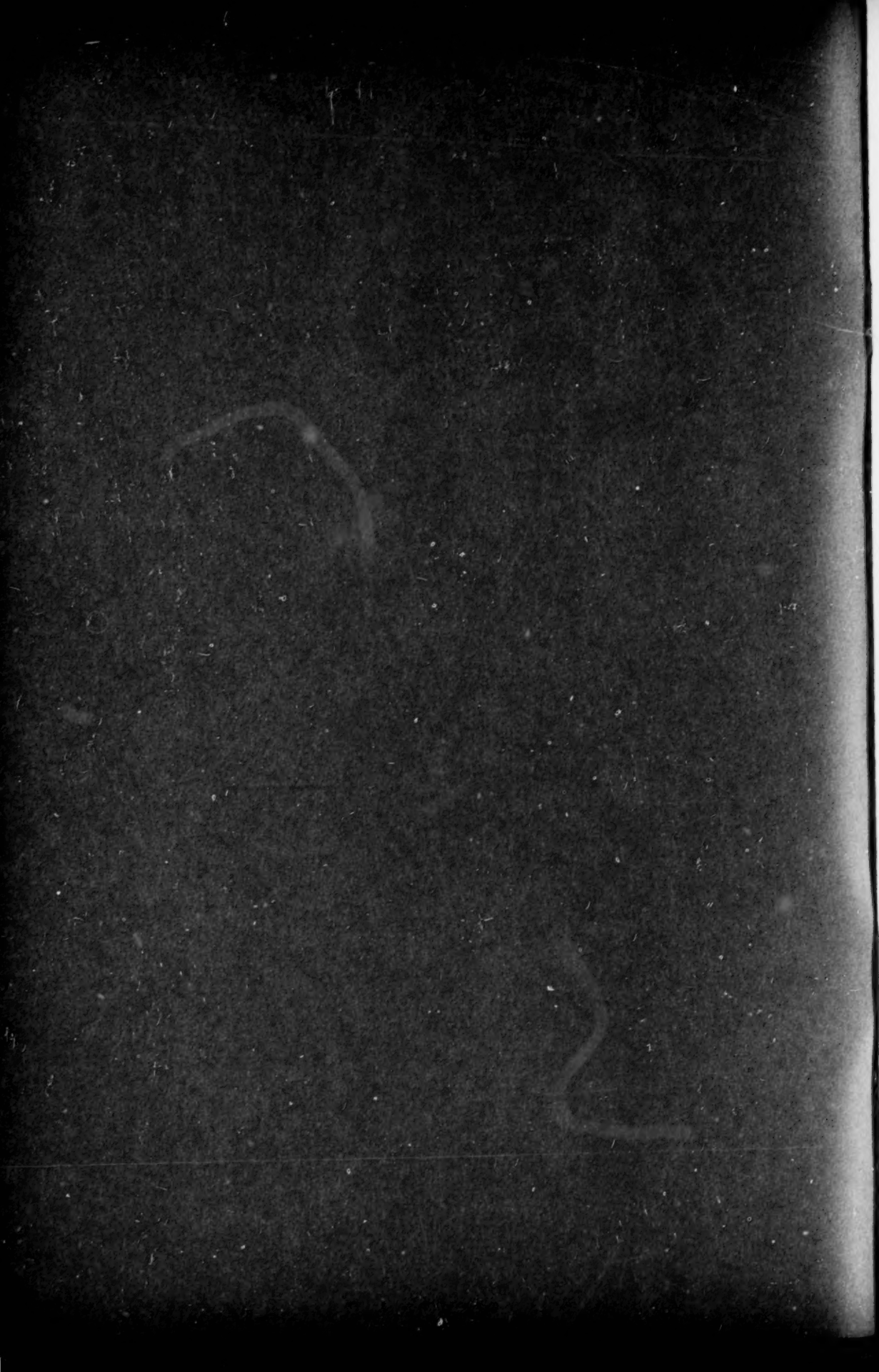

QUESTIONS PRESENTED

1. Did the Court of Appeals properly require Petitioners Tahoe-Sierra Preservation Council, *et al.*, before filing a Fifth Amendment takings challenge against the regional plan of Respondent Tahoe Regional Planning Agency, to apply for an amendment of the plan as to their specific properties under the special procedure of Article V(a) of the Tahoe Regional Planning Compact, a procedure at the election of the property owner and under which TRPA is compelled to timely consider and act upon the application?

2. Should this Court grant certiorari to consider a takings-ripeness case emanating from regulations of the Tahoe Regional Planning Agency governing land use and environmental protection in the unique, complex ecosystem of the Lake Tahoe Basin when, because of the state of the record below, the questions posed by petitioners are ambiguous and possibly moot, and when granting certiorari may well encourage a spate of facial takings claims presenting no concrete controversies?

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3 K. Manaster and D. Selmi, *California Environmental Law and Land Use Practice*, Section 64.04 (6) (1990) 9

TABLE OF ABBREVIATIONS

The following abbreviations are employed in this brief:

1.	"App."	– Appendix to Petition for Writ of Certiorari of Tahoe-Sierra Preservation Council, Inc., *et al.*
2.	"C.R."	– District Court Clerk's Record
3.	"Pet."	– Petition for Writ of Certiorari of Tahoe-Sierra Preservation Council, Inc., *et al.*
4.	"TRPA"	– Respondent Tahoe Regional Planning Agency
5.	"TSPC"	– Collectively Petitioners Tahoe-Sierra Preservation Council, Inc., *et al.*
6.	"1969 Compact"	– Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969); Cal. Gov. Code Sections 66800 and 66801; N.R.S. 277.190 and 277.200
7.	"1980 Compact"	– Tahoe Regional Planning Compact, as amended, Pub. L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code Sections 66800 and 66801; N.R.S. 277.190 and 277.200
8.	"1984 Plan"	– The TRPA Regional Plan, adopted April 26, 1984

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

The Tahoe Regional Planning Agency, Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, filed January 28, 1991, by Tahoe-Sierra Preservation Council, Inc., and named members thereof, Petitioners.

I

OPINIONS BELOW

TRPA[1] concurs in this portion of TSPC's petition, except that the decisions of the United States District Court, District of Nevada, were reported: *Tahoe-Sierra Preservation v. Tahoe Reg. Planning,* 611 F.Supp. 110 (D. Nev. 1985); *Tahoe-Sierra Preservation v. Tahoe Regional Planning,* 638 F.Supp. 126 (D. Nev. 1986).

II

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is Article V(a) of the 1980 Compact (Pub. L. No. 96-551, 94 Stat. 3233, 3239 [1980]; App. E, at 88a), which provides:

> If a request is made for the amendment of the regional plan by:
>
> * * *
>
> (2) the owner or lessee of real property which would be affected by such amendment,
>
> the governing body shall complete its action on such amendment within 180 days after such request is accepted as complete according to standards which must be prescribed by ordinance of the agency.

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[1] Terms represented by abbreviations such as "TRPA", "TSPC" and others frequently used in this brief are referred to in the Table of Abbreviations set forth on the page immediately preceding the title page.

III

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves the sensitive environmental enclave in the Lake Tahoe Basin and the special approach there to land use and environmental planning. It focuses upon the failure of TSPC, a would-be Fifth Amendment takings plaintiff, to pursue a unique procedure in the interstate compact creating TRPA requiring the agency to timely consider a request by TSPC to amend the agency's regional plan with respect to the specific property owned by TSPC.[2] Eschewing this procedure, TSPC raises what it characterizes as an exclusively "facial" takings challenge to TRPA's 1984 Plan.[3]

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[2] TSPC implies that its organization represents all property owners interested in TRPA's 1984 Plan. *See* Pet., at 3. That is not the case: property-owner petitioners here number 364, while TSPC's complaint alleges, as is the case, that there are literally thousands of vacant, single-family residential lots or parcels in the Lake Tahoe Basin. App. F, at 153a-154a.

[3] TSPC's complaint does not use the words "facial" or "on its face" when describing its challenge to TRPA's 1984 Plan. Moreover, the complaint incorporates voluminous, detailed appendices describing each of the individual plaintiffs' properties. Two examples are attached as an appendix to the petition. App. F, at 195a-199a. The "facial" gloss was first placed upon its complaint in TSPC's opposition to defendants' motions to dismiss the complaint upon ripeness and other grounds. C.R. 28, at 70-72. Confronted with the reasons for the appendices, TSPC maintained they were attached "only for the sake of orderliness and brevity". *Id.*, at 71. Subsequent briefing by the parties treated the complaint as though it presented a facial challenge, although, contrary to TSPC's representations

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B. PROCEEDINGS BELOW

TSPC states the defense based upon Article V(a) of the 1980 Compact was "just cursorily mentioned" in one of Respondents' briefs below and was "never seriously argued" to the District Court. Pet., at 25. That is not correct. While the trial court relied upon alternative grounds for holding TSPC's complaint premature (App. C, at 62a-63a), the Article V(a) ground was explicitly asserted in TRPA's brief in support of its motion to dismiss TSPC's complaint. C.R. 16, at 56. TSPC addressed it in its opposition to the motion (C.R. 28, at 70-72), and then TSPC *raised* the Article V(a) issue in its opening brief in the Ninth Circuit Court of Appeals. Opening Brief for Appellants, at 41-42. TRPA in turn defended the ground in its brief before the appellate court. Brief of Appellee, at 17, 22-23.

C. THE LAKE TAHOE BASIN[4]

The Lake Tahoe Basin rests over 6,000 feet above sea level in the Sierra Nevada and occupies 324 square miles

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to this Court (Pet., at i, 11, & 12, n. 10), the Ninth Circuit Court of Appeals' decision did not hold or determine TSPC's "facial challenge" was not ripe for review. The Ninth Circuit never used the terms "facial", "on its face" or other words of similar purport. *See* App. A.

[4] Most of the following description is taken from the Environmental Impact Statement for the Establishment of Environmental Threshold Carrying Capacities, Tahoe Regional Planning Agency, May, 1982. The document was attached as

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astride the California-Nevada border. Lake Tahoe, the focal point of the basin, is surrounded by magnificent mountain peaks, some almost a mile higher than the surface of the lake. Descending abruptly from the peaks and ridges to the lake's edge, the lands within the basin are quite steep, with about three-quarters of the area comprising slopes in excess of 30%. C.R. 17, Ex. B, at 7.

Lake Tahoe is 12 miles wide and 22 miles long, with a surface area of 192 square miles. It is the tenth deepest lake in the world, having a maximum depth of 1,645 feet. *Id.*, at 8. Lake Tahoe is "ultraoligotrophic", characterizing a lake which is extremely clear with low concentrations of nutrients otherwise supporting the growth of algae. Until recently, the lake had a 10,000-year history of being at or near equilibrium in the gain and loss of nutrients. *Id.*, at 9.

Nutrients, such as nitrogen, are introduced to Lake Tahoe through surface and sub-surface flows from the lake's 63 watersheds. The amount of nitrogen and other nutrients carried to the lake depends upon the soils, vegetation and land use within each watershed. *Id.*, at 10.

Impervious cover and surface disturbance of soil in the Lake Tahoe Basin impede the soil's natural function as a medium for growth of vegetation and storage of

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Exhibit B to C.R. 17, an affidavit submitted for purposes of judicial notice in support of TRPA's motion to dismiss TSPC's complaint. It will be cited in the text through the short-form designation, "C.R. 17, Ex. B". References in the text to other exhibits to C.R. 17 are to other documentary evidence attached to the affidavit.

nutrients. Vegetation is an important component of the ecosystem, responsible for removing nutrients, particularly nitrogen, from precipitation. Absent vegetation, erosion increases sediment loads to Lake Tahoe, in turn resulting in the storage of nutrients in the lake, rather than in the watershed where they belong. C.R. 17, Ex. D, at 30. Impervious cover on the other hand prevents infiltration of precipitation, resulting in heightened runoff. C.R. 17, Ex. B, at 17-18.

The recent annual suspended sediment load to Lake Tahoe from surface runoff is approximately 27,000 metric tons, about four times the natural load. Isolated examples of development have revealed suspended sediment concentrations 100 to 1,000 times the natural. These elevated loads of sediments, accompanied by nutrients, cause a decline in clarity and an increase in algal productivity in the lake. C.R. 17, Ex. D., at 31.

Lake Tahoe and its tributaries are experiencing a downward trend in water quality. Sediment-caused disturbance of the lake's natural nutrient-loading equilibrium has resulted in accelerated eutrophication of the waters: a decline in annual average depth of visibility from 31.2 meters in 1968 to 27.6 meters in 1981; a decline in winter clarity from an average of 33.6 meters' visibility in 1968 to 14.9 meters in 1981. There has been a corresponding increase in algae of 110% from 1959 to 1980, averaging 5.2% per year.[5] C.R. 17, Ex. B, at 12.

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[5] These alarming trends prompted the framers of the 1980 Compact to declare in Article I(a)(1) that the waters of Lake

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The Lake Tahoe Basin contains thousands of *undeveloped*, single-family residential lots. C.R. 17, Ex. C, at 13. Even TSPC alleges that TRPA has documented approximately 19,300 vacant lots or parcels, of which 6,400 are wholly or partially located in Land Capability Districts 1, 2 or 3 and 4,900 similarly classified as Stream Environment Zone (SEZ).[6] App. F, at 153a. All of TSPC's lots fall within these most-sensitive categories. *Id.*, at 154a. And TSPC does not dispute the correctness of their classification. App. A, at 17a.

The basin's unparalleled natural features, coupled with close proximity to large population centers primarily in Northern California, have marked it the quintessential retreat. But in the prescient words of the California

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Tahoe were "threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity" of the area. App. E, at 73a. Moreover, what TSPC *now* describes as "perceived environmental abuses" (Pet., at 4 & 6) were never the subject of debate below. Indeed, TSPC has *never* disputed – or even questioned – the overwhelming evidence documented in the record below that Lake Tahoe is becoming increasingly polluted.

[6] TRPA employs a scientific system of "land capability" classification, which allocates maximum amounts of impervious surface depending upon, among other things, the erosion and runoff potential of soils and the slopes on which they are located. Capability classes or districts range from 1 to 7, with Classes 1 through 3, including Stream Environment Zones (Class 1 [b]), comprising the "high-hazard" or most-sensitive lands of the spectrum. Class 1 and 2 lands are allowed 1% coverage while lands in Class 3 are allowed 5%. *See* C.R. 17, Ex. B, at 19; *see generally People of California v. Tahoe Regional Plan Agency*, 766 F.2d 1308, 1315 (9th Cir. 1985). In its 1972 Plan adopted under the 1969 Compact (Pub. L. 91-148, 83 Stat. 360 [1969]) TRPA allowed numerous coverage "overrides" to the percentage limitations.

Supreme Court, "there is good reason to fear that the region's natural wealth contains the virus of its ultimate impoverishment." *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 485, 96 Cal.Rptr. 553, 487 P.2d 1193 (1971). As things now stand, the region does not have a supply of resources and capacities adequate to meet pressing residential demands, not to mention those for commercial and recreational uses, and yet maintain the values the framers of the 1980 Compact found so important. *See* C.R. 17, Ex. C, at 13.

D. THE UNPRECEDENTED APPROACH TO STEMMING THE DECLINE

1. The 1969 Compact. As unmatched as the Lake Tahoe Basin itself is the effort to preserve it. Although it is a single air and water basin comprising portions of two states, six local governments and numerous special districts, along with substantial federal holdings, there has been a unified, if novel, endeavor to address the area's problems. The States of California and Nevada, with the approval of Congress, selected the interstate compact as the best means to treat its manifestly complex needs.

In 1969 they enacted the Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969). Establishing an agency described as the "*sui generis* [offspring] of a marriage between sovereign partners", *People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag.*, 516 F.2d 215, 218 (9th Cir. 1975), *cert. denied*, 423 U.S. 868 (1975), the 1969 Compact mandated TRPA's adoption of a regional plan of resource conservation and orderly development. 1969 Compact, Article I(c). Complying, the agency in 1972

adopted a regional plan and implementing ordinances. But because of a number of structural deficiencies in the Compact, they failed to cope with the persistent decline in the quality of the lake and its environs. *See generally* 3 K. Manaster and D. Selmi, *California Environmental Law and Land Use Practice*, Section 64.04 (6) (1990).

2. The 1980 Compact. Due to the failure of the 1969 Compact to cope with the degradation of the Lake Tahoe Basin, the states, with Congress' approval, extensively amended the document in December 1980. Pub. L. 96-551, 94 Stat. 3233 (1980).[7] In terms far more exigent than its predecessor, the 1980 Compact accentuated the mounting threats to the ecology of the region (Art. I[a], App. E, at 73a-75a) and declared the need to establish "environmental threshold carrying capacities"[8] and adopt a plan achieving them while providing orderly growth.

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[7] The 1980 Compact is contained in Appendix E to TSPC's petition. The background of the 1980 amendments to the Compact and a description of the planning process they commenced are treated in *People of California v. Tahoe Regional Plan. Agency, supra*, 766 F.2d, at 1310-1312.

[8] "Environmental Threshold Carrying Capacity" is defined in Article II(i) (App. E, at 77a) of the 1980 Compact as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region." Environmental thresholds are to include, but not be limited to, "standards for air quality, water quality, soil conservation, vegetation preservation and noise." *Id.*

3. Implementation of the 1980 Compact. The 1980 Compact triggered an unprecedented planning effort, not simply for a well-planned, pleasant community, but to rescue a world-class Alpine environment from the grips of imminent pollution. As a first step, TRPA on June 25, 1981, enacted Ordinance 81-5 (effective August 25, 1981), representing a coalescence of TRPA's responsibilities as an area-wide planning agency under Section 208 of the Federal Clean Water Act (33 U.S.C. Section 1251, *et seq.*) and to ensure the amended plan required by the 1980 Compact would not be outstripped by precipitate development of high-hazard lands.[9] Ordinance 81-5 was designed to give TRPA a measure of "breathing room" in its attempt to cope with the enormous dilemma of thousands of single-family lots located in sensitive lands.[10]

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[9] Ordinance 81-5 appears in the record at C.R. 17, Ex. I. The focus of TSPC's petition is TRPA's 1984 Plan, *infra*, and TSPC disparages the plan as a continuation of a "similar predecessor 'interim moratorium' ", referring to Ordinance 81-5. Pet., at 4. Ordinance 81-5, however, contained a "case-by-case" system for approving construction of single-family homes on Land Capability Class 1, 2 and 3 lots (excluding SEZ's) in Nevada, a system for which TSPC clamored but, as the Court of Appeals correctly observed, of which it *failed* to take advantage. App. A, at 16a. TSPC thus incorrectly asserts that Ordinance 81-5 "effectively prohibited" building on TSPC's residential parcels. Pet., at 7.

[10] TRPA determined later that construction of a typical single-family residence on Class 1, 2 or 3 lands caused a significant adverse impact on water quality resulting from sediment-loading of approximately .44 metric tons per year for *each* such residence. C.R. 17, Ex. H, Section 1.28.

On August 26, 1982, TRPA adopted environmental threshold carrying capacities for the Lake Tahoe Basin. C.R. 17, Ex. A. The threshold, or standard, for impervious cover of soil was compliance with the percentage-coverage classifications of TRPA's land capability system. On April 26, 1984, TRPA adopted an amended regional plan, known as the "1984 Plan", representing the agency's first, albeit unsuccessful, attempt to comply with the mandates of the 1980 Compact. C.R. 17, Ex. F. Culminating an historic planning process of dimensions not even the framers of the 1980 Compact could have contemplated, *see People of California v. Tahoe Regional Plan Agency, supra,* 766 F.2d, at 1311-1312, the 1984 Plan attempted to balance acute pressures for use and development with consumption of the scant remaining resources of area. Regulating the amount, location and timing of development in conformance with the environmental thresholds, the plan prescribed a single-family residential evaluation system allowing 75 residences per year to be constructed during the first three years on Class 1, 2 and 3 lots, excluding SEZ's, in the Nevada portion of the basin. The plan contained an elaborate system of transfer of development rights, applicable to all high-hazard lands.[11]

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[11] TSPC neglects the transfer program in its description of the "only" uses permissible in SEZ's. Pet., at 9, n. 7. Moreover, TSPC offers that the 75-residences-per-year provision for building on Class 1, 2 and 3 lots was but a "theoretical exception" that "to date" has never been implemented – as though it were a ruse. *Id.*, at 9, n. 8. To the contrary, the residential-evaluation system was *real* but, as indicated below, enjoined from implementation. That TSPC impugns it as merely "theoretical" and never taking effect, while opining a mere three footnotes earlier that the 1984 Regional Plan "remained in full force and effect" (*id.*, at 8, n. 5), is misleading.

It was TSPC's failure to file an application under Article V(a) of the 1980 Compact for mandatory consideration of an amendment to the 1984 Plan that in the judgment of the Court of Appeals rendered its takings challenge unripe. App. A, at 8a-16a.[12]

4. The California Attorney General's Injunction. On April 26, 1984, the very day TRPA adopted the 1984 Plan, the State of California sued TRPA for declaratory and injunctive relief, alleging the plan did not comply with the 1980 Compact. *People of California v. Tahoe Regional Planning Agency,* No. CIVS-84-0561-EJG (E.D. Cal. 1984). Following an immediate temporary restraining order, the District Court on August 9, 1984, preliminarily enjoined TRPA from approving any project within the basin, subject to certain limited exceptions not applicable here. *See* App. A, at 5a, n. 2. The District Court's order was affirmed on appeal. *People of California v. Tahoe Regional Plan Agency, supra,* 766 F.2d 1308.

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[12] The Court of Appeals noted TRPA had urged TSPC's failure to pursue "*several* features of the 1984 Plan rendered its attack on the plan premature." *See* App. A, at 7a-8a (emphasis added). That is correct, for in addition to the unusual procedure of Article V(a), the 1984 Plan offered the following measures: the 75 annual permits for development of Class 1, 2 and 3 lands; a procedure to challenge the land capability classification of one's land; a system of transfer of development rights; and an opportunity to challenge the land capability classification of SEZ lands. *See* App. C, at 62a-63a. As the District Court observed, TSPC "admitted at oral argument that none of the options arguably open to land owner plaintiffs [sic] have been attempted." *Id.*, at 63a-64a.

5. The 1987 Plan. Following the 1984 Plan litigation, a process known as the "Consensus-Building Workshop" was initiated by TRPA to include the broadest possible range of private and governmental interests and viewpoints on the makeup of an amended plan. Lasting over two years, the discussions precipitated a plan adopted by the TRPA Governing Board on June 25, 1987. Approved in the settlement of the 1984 Plan litigation, the 1987 Plan is dramatically distinct from its predecessor and includes a scientifically-based individual parcel evaluation system for gradual development of unbuilt residential lots, excluding those located in streamzones. All lots in the basin, including SEZ lots, are entitled to transfer a number of different development rights under the plan.[13]

IV

REASONS FOR DENYING THE PETITION

A. SUMMARY

TSPC's petition should be denied for at least the following reasons: (1) the issues here – if they clearly emerge at all – do not present nationally important questions of federal law; (2) the Court of Appeals' decision accords with the precedents of this Court in its treatment

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[13] Respondent State of California in its Brief in Opposition will argue that enactment of the 1987 Plan rendered takings claims with respect to the 1984 Plan moot. In addition, California will contend that, since the 1984 Plan never took effect, it could not have caused a taking of TSPC's properties.

of facial takings claims[14]; and (3) granting certiorari will only confuse, not clarify, issues surrounding facial takings and pose practical problems for federal courts handling takings cases.

B. THE ISSUES HERE – ASSUMING THEY CLEARLY EMERGE AT ALL – ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW

Land use and environmental planning for the Lake Tahoe Basin does not lend itself to issues of national significance. The unique processes challenged by TSPC, to be sure, are driven by the equally exceptional qualities of the basin. Planning for Lake Tahoe's complex ecosystem and developmental patterns, quite simply, is like planning for no other place on earth.

Also extraordinary is the process of Article V(a) of the 1980 Compact (App. E, at 88a), which TSPC elected to forego. While TSPC casts the provision as similar to a California statutory deadline for action on land use permit applications (Pet., at 28, n. 19), the comparison misses the mark. A permit process, oftentimes ministerial in nature, assumes the existence of legislative infrastructure, such as a general plan, under which permits are issued. Far from compelling action upon a mere permit, Article V(a) allows the applicant, for its specific property, to target legislative considerations in establishing the infrastructure to begin with – in short to change the plan.

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[14] Respondent State of California will address TSPC's contention that the decision of the Court of Appeals is at odds with recent decisions of other circuits. Pet., at 20-22.

Finally, what TSPC posits as a clear dichotomy in this case between facial and as-applied takings is not readily apparent from the record. Amid problems of pleading clarity, including highly specific complaint-appendices describing each plaintiff's property, alternative ripeness remedies eschewed by TSPC, and questions of causation and mootness, the would-be facial takings issue TSPC presents is at best muddled.

Accordingly, any decision on the issues here would be so steeped in novelty and confusion of the record that its precedential value would be quite limited.

C. THE COURT OF APPEALS' DECISION ACCORDS WITH PRECEDENTS OF THIS COURT

1. Lending Itself to Finality of Governmental Action, Article V(a)'s Special Procedure Must be Pursued Before Launching a Federal Takings Claim. TSPC maintains Part III. A. of the Ninth Circuit's decision (App. A, at 8a-16a) conflicts with or misapplies precedents of this Court. Pet., at 12-20. At the same time TSPC is unable to cite a single case addressing ripeness in the context of a procedure even remotely akin to Article V(a). *None* of TSPC's cases – nor any we have unearthed – holds or hints that a takings plaintiff may shun such a course and bolt immediately to a facial attack. For TSPC to maintain in essence that "no court has said you must first seek to amend the plan to ripen a claim against it" does not *raise* the question – it only shows the issue *never has* been raised.

Article V(a), geared to the specific property of the applicant, is a sensible measure to achieve the finality of governmental action emphasized by this Court as the kernel of a ripe takings claim. As much as the Court insisted the plaintiff in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-191 (1985), first apply for a variance to obtain a "final decision regarding how it will be allowed to develop its property", TSPC was properly held here to pursuit of a final decision under Article V(a). That course is necessitated by the takings ad hoc, factual inquiry into the economic impact of the challenged regulation and the extent to which it interferes with reasonable investment-backed expectations.[15] As this Court put it in a decision shortly after *Williamson*, there must be a "final and authoritative determination of the type and intensity of development legally permitted

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[15] Requiring a final, definitive position under Article V(a) on how a prospective takings plaintiff may develop its property is analogous to this Court's historic insistence upon the finality of legislative action before it is challenged. *See, e.g., Prentis v. Atlantic Coast Line*, 211 U.S. 210, 228-230 (1908) (dismissed, as premature, takings challenge to order fixing rail-passenger rates because of plaintiff's failure first to pursue state constitutional right to appeal rates and obtain final decision fixing them). The reasoning of *Prentis* was recently reaffirmed, although held inapplicable, in *New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 350, 105 L.Ed.2d 298, 319-320, 109 S.Ct. 2506, 2520 (1989). *New Orleans* intimated, however, that if there were an on-going legislative process, such as in *Prentis*, one could not assert even a *facial* challenge to an allegedly unconstitutional statute or zoning ordinance. *Id.*, 105 L.Ed.2d, at 320; 109 S.Ct., at 2520.

on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

2. This Court Has Not Encouraged Facial Takings Claims. Addressing a facial takings challenge to the Surface Mining Control and Reclamation Act of 1977, this Court in *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981), criticized the District Court for ignoring the Court's "oft-repeated admonition" that, particularly in cases alleging an unconstitutional taking of private property, the constitutionality of a statute should not be decided "except in an actual factual setting that makes such a decision necessary." *Id.*, at 294-295. The Court stressed, moreover: "Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land." *Id.*, at 295. The only issue before the Court, then, was whether the "mere enactment" of the surface mining statute constituted a taking. *Ibid.* Finding no taking, this Court held plaintiffs could not complain about the act because they had not availed themselves of administrative relief under it, relief possibly working a "mutually acceptable solution" and thus obviating the need to address constitutional questions. *Virginia Surface Mining*, 452 U.S., at 297.

In *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 490-495 (1987), a facial takings attack on a Pennsylvania law prohibiting mining-caused subsidence, this Court cited *Virginia Surface Mining*, 452 U.S. 264, and repeated the admonition that takings claims should be

presented in actual factual settings. 480 U.S., at 494. It cautioned plaintiffs of the difficulty in showing that the "mere enactment" of a regulation denied them economically viable use of their property, observing that they "face[d] an *uphill battle* in making a facial attack. . . . " *Id.*, at 495 (emphasis added).

The admonition of *Virginia Surface Mining* and the caution of *Keystone* reached their apex in *Pennell v. San Jose*, 485 U.S. 1 (1988), where an association of apartment-house owners challenged, as " '*facially* unconstitutional and therefore . . . illegal and void' ", a rent-control ordinance enacted by the City of San Jose. *Id.*, at 4 (emphasis added). The measure allowed a hearing officer to consider hardship to the tenant when determining whether to approve a rent increase proposed by a landlord. *Ibid.* This Court held it would be "premature" to consider the contention that reduction of rent on grounds of hardship accomplished an unconstitutional transfer of the landlord's property to individual tenants. *Pennell*, 485 U.S., at 9. It stressed not only that the tenant hardship clause had never been relied upon by a hearing officer to reduce rent, but that the officer was only given discretion, not compelled, to refuse rent increases on the basis of hardship. *Id.*, at 9-10.

Citing *Virginia Surface Mining*, 452 U.S. 264, the *Pennell* Court once again warned that takings cases should be resolved in actual factual settings making a decision necessary. *Pennell*, 485 U.S., at 10. It found that merely because a hearing officer was required to consider hardship to the tenant in fixing a landlord's rent, there was no sufficiently concrete factual setting absent a showing that in a particular case such an action had occurred. *Id.*

In *Pennell*, then, this Court clearly applied the doctrine of ripeness to a *facial* takings claim.[16] That, of course, is precisely what TSPC maintains this Court has never done.[17] *See* Pet., at 18-20.

In view of these cases, especially *Pennell*, it is highly suspect a takings plaintiff can so easily circumvent the ad

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[16] In his dissent, Justice Scalia disagreed with the majority opinion's conclusion that the takings claim, as distinguished from other claims, was premature. *Pennell*, 485 U.S., at 15 (Scalia, J., dissenting). Justice Scalia remarked that, while *Keystone Bituminous Coal Assn.*, 480 U.S. 470, had declared a facial takings claim to be a battle that was "uphill", "we allowed it to be fought, and did not declare it 'premature'." 485 U.S., at 17. He observed that the majority in *Pennell* thus had rejected as unripe a challenge to the "mere enactment" of a statute. *Id.*, at 18. He implied, however, that a challenge to a regulation because it denied an owner economically viable use of his or her land properly may be held unripe in its facial form *"where the issue can be more forcefully presented in an 'as-applied' attack. . . . " Id.*, at 18-19 (emphasis added). He contrasted the facial takings claim in *Pennell*, however, stressing it asserted that the rent-control ordinance did not substantially advance legitimate state interests. *Ibid.* The substantiality prong of takings analysis is not involved in the case at bar – the economically viable use question *is*.

[17] Contrary to what TSPC suggests and aside from *Pennell v. San Jose*, 485 U.S. 1, this Court has never hesitated to apply ripeness principles to facial statutory and regulatory challenges. *See, e.g., Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 200-203 (1983); *Buckley v. Valeo*, 424 U.S. 1, 113-118 (1976); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138-148 (1974); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967); *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164-166 (1967).

hoc, factual inquiry by sidestepping a procedure such as Article V(a) of the 1980 Compact. That procedure, one over which *the property owner* has control to initiate and mandate a timely response, is an extraordinary means to bridge the gap between facial and as-applied claims.[18]

D. GRANTING CERTIORARI POSES LEGAL AND PRACTICAL PROBLEMS OF NATIONAL IMPORTANCE

If this Court grants TSPC's petition – not to mention reverses the Ninth Circuit's decision – it will send a confusing message. While the Court to date unmistakably has labored to discourage facial takings claims, in favor of ones presenting justiciable controversies, hearing this case undoubtedly will encourage prospective plaintiffs to file the facial variety, at the expense of developing key facts for the ad hoc, factual inquiry – and of possibly resolving the matter. Federal courts thus may face a

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[18] TSPC would short-circuit resort to Article V(a) by asserting an attempt to amend the plan would be futile because the plan was adopted over TSPC's "vehement" opposition. Pet., at 7 & 15. The argument, however, obfuscates the important distinction between a global enactment, such as the regional plan, and consideration of its applicability to *specific property*, a process envisioned by Article V(a). TSPC's further complaint, that applying for relief under Article V(a) may well time-bar a challenge to the regional plan, is equally to no avail. Pet., at 25, n. 17. Indeed, under Article VI(j)(4) of the 1980 Compact (App. E, at 105a) a legal action challenging a plan of the agency "shall be commenced within 60 days after *final* action by the agency." (Emphasis added.) A takings claim, even to the mere enactment of the plan, obviously would not be final until relief had been sought and action taken under Article V(a).

superfluity of facial cases brought by litigants merely attempting to test the "takings waters", albeit in disregard of procedures such as Article V(a) of the 1980 Compact. And if their facial cases are unsuccessful, the plaintiffs simply may turn around and ripen as-applied challenges – and file additional suits.

Accordingly, we respectfully submit it appears of national importance to *reject* TSPC's petition.

V

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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